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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services	)	WC Docket No. 13-

CENTURYLINK PETITION FOR FORBEARANCE

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TABLE OF CONTENTS

ATTACHMENTS

EXECUTIVE SUMMARY

About the worst mistake a regulatory agency can make is to treat similarly situated competitors unequally. It is bad for competition, it is bad for consumers, and it is bad for economic growth. Picking out some competitors for better treatment than others also undermines the intellectual foundation of fairness and predictability on which any regulatory regime must rest. Yet -- though surely not the Commission's intention -- this is precisely what the Commission has allowed to happen in the enterprise broadband services market. There is no economic or intellectual justification for this state of affairs, and the Commission has a unique opportunity, as well as a legal and moral obligation, to correct it.

Virtually alone among national providers of enterprise broadband services, CenturyLink is subject to a disjointed set of regulations that vary depending on the CenturyLink affiliate that provides those services. CenturyLink provides enterprise broadband services primarily through three "legacy" affiliates: CenturyTel, Embarq, and Qwest. CenturyTel, and, to a large extent, Embarq, are stuck in a time warp of 1990s regulation with regard to enterprise broadband services. All of their competitors have, for decades, been able to offer enterprise broadband services free of dominant carrier and related regulation, including all tariffing requirements. And similarly situated incumbents -- including CenturyLink's legacy Qwest affiliate and, for some services, its Embarq affiliate -- were granted equivalent or greater forbearance relief several years ago under Section 10 of the Communications Act of 1934. Yet CenturyLink continues to labor under dominant carrier regulation for many of its enterprise broadband offerings, including price cap regulation and its accompanying competition-inhibiting and time-consuming tariff rules. To say this is irrational is to be kind.

This arbitrary patchwork of federal regulation often sidelines CenturyLink altogether from meaningful participation in the enterprise broadband market. Put more bluntly, a competitor has effectively been eliminated from the market by this regulatory regime. The result is that competitive choice in, and efficient provision of, enterprise broadband service suffers -- to the detriment of customers and contrary to the public interest. This disparate regulation frequently also precludes CenturyLink from entering into the individually tailored, multi-location arrangements that the large, sophisticated purchasers of enterprise broadband services demand in today's competitive market, thereby depriving those customers (and the U.S. economy) of the full benefits of competition.

This uneven regulatory regime flouts the most basic principle of administrative law, and one that is reinforced by Section 10, namely, that all similarly situated parties must be treated alike. An agency may not prohibit one entity from doing that which it permits to another similarly situated. The denial of forbearance relief has been held arbitrary and capricious under the Administrative Procedure Act ("APA") when these principles were violated.

Accordingly, CenturyLink seeks forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to all of its packet-switched and optical transmission services still subject to those rules. The appropriate standard for an analysis of such a forbearance request was established in the orders granting other incumbent local exchange carriers ("ILECs") the same forbearance with regard to the same enterprise broadband services. In those orders, the Commission recognized that the dynamic, rapidly evolving nature of enterprise broadband services and the sophistication and size of the customers required that competition in those services be analyzed as a group and that a national market analysis be conducted. The Commission also has acknowledged that broadband service forbearance requests

require it to take into account the mandate of Section 706 of the Telecommunications Act of 1996 ("1996 Act") to promote broadband investment by reducing investment-deterring regulation.

In granting forbearance to other ILECs offering enterprise broadband services, the Commission found that the market for such services is highly competitive and that dominant carrier regulation is thus unnecessary and ill-suited for those services and in fact hampers competition. The enterprise broadband market is even more dynamically competitive today. There are over 30 national and regional competitors offering services to large multi-location customers with considerable bargaining power, rendering dominant carrier regulation even more unfit for the CenturyTel and Embarq services still subject to those rules. CenturyLink accounts for only ten percent or less of the overall market and has always been less "dominant" than either of the previously forborne market leaders, Verizon and AT&T.

As the Commission correctly predicted in granting such forbearance to Qwest and, to some extent, Embarq (as well as AT&T, ACS of Anchorage and Frontier), elimination of dominant carrier regulation permits a carrier to respond more quickly to competing service offerings and meet customer requests for arrangements specifically tailored to their individualized needs. Since that time, the average prices for the services covered by those forbearance petitions have declined substantially. The absence of any harm to enterprise broadband consumers over the past few years confirms the Commission's predictions.

With this petition, CenturyLink seeks to extend the customer benefits of ending unnecessary regulation across the entirety of its operations. By enabling CenturyLink to compete more effectively, and eliminating its tariffs as a pricing umbrella, forbearance will also

put general downward pressure on prices for these services. Thus, the requested relief will benefit all customers.

The Commission has recognized that, in these circumstances, forbearance serves the public interest by eliminating the distorting effects of asymmetrical regulation and promoting "regulatory parity" among similarly situated parties. Today, when CenturyLink is the only major national incumbent provider of enterprise broadband services that has *not* been granted the requested relief, and much larger ILECs, as well as all of CenturyLink's other competitors, are free of dominant carrier regulation of their enterprise broadband services, the case for regulatory parity is at its zenith. It cannot serve consumers or the public interest for one provider to be arbitrarily selected for continued regulatory burdens lifted from others similarly situated.

Regulatory parity with CenturyLink's competitors would enhance competition and encourage broadband investment. Parity also would enable CenturyLink to take advantage of its extensive geographic reach and the synergies inherent in the CenturyTel-Embarq and CenturyLink-Qwest mergers, rather than forcing customers to purchase via tariff from legacy CenturyTel and, in most cases, Embarq, and by commercial agreement from legacy Qwest, potentially with different rates, terms and conditions from all three affiliates. The current regime is confusing and unpredictable, creating administrative burdens for customers.

Section 10's regulatory parity goal echoes the APA's command that all similarly situated parties be treated alike. Failure to recognize the need to ensure regulatory parity in CenturyLink's circumstances -- the strongest case yet for regulatory parity in the enterprise broadband context -- would arbitrarily and capriciously treat similar situations dissimilarly.

Given these facts, the requested relief easily satisfies Section 10's criteria for forbearance from dominant carrier regulation and the *Computer Inquiry* requirement to offer, pursuant to tariff, the basic transmission services underlying an incumbent's enhanced services:

- Neither dominant carrier regulation, nor the *Computer Inquiry* tariffing requirement, is necessary to ensure just, reasonable and nondiscriminatory rates for enterprise broadband services. On the contrary, this outmoded regulation harms competition, because entities such as CenturyLink are not able to reduce prices in response to competitive offerings, and consumers have benefited greatly from the elimination of those rules from most of the industry.

- Such regulation also is not necessary to protect purchasers of these services, which are large and sophisticated organizations exerting significant bargaining power. In fact, those rules preclude purchasers from obtaining the simple, individualized serving arrangements that they demand for these services in a timely manner from regulated entities such as CenturyLink, which must modify tariffs to meet specific customer needs.

- Granting the petition will further the public interest by facilitating the deployment of wired and wireless broadband services, furthering the goals of Section 706 of the 1996 Act, enhancing competition, ensuring regulatory parity with other incumbents and competitors, and eliminating outmoded and excessively burdensome and inconsistent regulation.

Other than removing the CenturyLink services granted forbearance from the scope of the Commission's pending review of special access regulation, a forbearance grant would have no impact on the special access proceeding. CenturyLink likewise will continue to be subject to the remaining requirements of Title II, including general common carrier obligations and Section 208 complaint procedures. Given that this petition raises no new issues of law or fact, it should be granted expeditiously, which can be done through delegated authority, as it presents no novel questions of fact, law or policy.

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CENTURYLINK PETITION FOR FORBEARANCE

INTRODUCTION

Pursuant to Section 10 of the Communications Act of 1934 and Sections 1.53 and 1.54 of the Commission's rules,[1] CenturyLink petitions the Commission for forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to its packet-switched and optical transmission services (together, "enterprise broadband services") that are still subject to those obligations. Forbearance is required to:

- Achieve "regulatory parity" between CenturyLink and other competitive and incumbent providers of enterprise broadband services, including larger incumbent providers that already have obtained forbearance relief;
- Bring the full benefits of competitive choice and lower rates to customers in the dynamically competitive enterprise broadband market and encourage broadband investment and deployment by permitting CenturyLink to participate effectively in that market; and
- Unify the disjointed, patchwork regulatory regime burdening CenturyLink's legacy affiliates, and their customers, with inconsistent tariffing and other requirements imposed on their enterprise broadband services.

A grant of forbearance would have no impact on the Commission's regulation of time-division multiplexing ("TDM")-based DS1 and DS3 services or the Commission's pending review of special access regulation. CenturyLink likewise will continue to be subject to the

[1] 47 U.S.C. § 160 ("Section 10"); 47 C.F.R. §§ 1.53, 1.54.

remaining requirements of Title II, including general common carrier obligations and the complaint remedies of Section 208 of the Communications Act of 1934.[2] Given that this petition raises no new issues of law or fact, it should be granted expeditiously, which can be done through delegated authority, as it presents no "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."[3]

I. BACKGROUND

CenturyLink seeks the same uniform nondominant regulation of its enterprise broadband services that applies to those services provided by other incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") alike, in order to provide customers the individually tailored contractual arrangements they seek. The requested relief easily satisfies Section 10's criteria for forbearance:[4]

- Neither dominant carrier regulation, nor the *Computer Inquiry* tariffing requirement, is necessary to ensure just, reasonable and nondiscriminatory rates for enterprise broadband services. On the contrary, this outmoded regulation harms competition, as the Commission has repeatedly found.

- Such regulation also is not necessary to protect purchasers of these services, which are large and sophisticated organizations, and in fact precludes them from obtaining the simple, individualized serving arrangements that they demand for these services.

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[2] 47 U.S.C. § 208.

[3] 47 C.F.R. §§ 0.91(m); 0.291(a)(2). Indeed, the Commission has granted forbearance petitions on delegated authority in the past. *See, e.g., Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Relief in Relation to the Provision of Nonlocal Directory Assistance Services*, Memorandum Opinion and Order, 18 FCC Rcd 8134 (WCB 2003); *Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services,* Memorandum Opinion and Order, 14 FCC Rcd 21484 (CCB 1999).

[4] *See* 47 U.S.C. § 160(a).

- Granting the petition will further the public interest by facilitating the deployment of wired and wireless broadband services, enhancing competition, ensuring regulatory parity and eliminating outmoded and excessively burdensome and inconsistent regulation.

CenturyLink previously requested similar forbearance relief for its enterprise broadband services ("2012 Forbearance Petition").[5] CenturyLink withdrew its 2012 Forbearance Petition, following Commission approval of such withdrawal, because of uncertainty as to the outcome of that proceeding.[6] This new petition permits a more complete presentation of the circumstances underlying the basic fairness of the requested relief, which are even more compelling now than when the previous petition was filed.[7]

CenturyLink is filing this forbearance petition simultaneously with an alternative request for an interim waiver of the same regulations for the same services, pending ultimate resolution of the appropriate regulatory treatment of incumbent enterprise broadband services in other proceedings ("Waiver Petition").[8] CenturyLink believes that this forbearance request provides a more straightforward path to the beneficial result of uniform nondominant carrier treatment in its

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[5] CenturyLink Petition for Forbearance, WC Docket No. 12-60 (Feb. 23, 2012) ("2012 Forbearance Petition").

[6] Five firms and two public agencies commented on the 2012 Forbearance Petition. Three firms supported the requested forbearance. Two competitors of CenturyLink in the enterprise broadband market, Sprint and tw telecom, opposed the petition, as did the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, which always oppose forbearance petitions and erroneously stated in their Joint Comments that the ILEC "industry" has market power and an "all-too-often captive subscriber/consumer base" and thus cannot justify forbearance. Joint Comments and Opposition of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel at 4, WC Docket No. 12-60 (Apr. 20, 2012).

[7] Section 1.54 of the Commission's rules requires that a petition for forbearance "must be complete as filed," 47 C.F.R. §1.54, and contain "all" of the "data upon which [petitioner] intends to rely." *Id.* at § 1.54(e)(3)(ii).

[8] *See* CenturyLink Alternative Petition for Interim Waiver, WC Docket No. 13- (Dec. 13, 2013) ("Waiver Petition").

provision of enterprise broadband services. If, however, the Commission believes that waiver is a more appropriate means of according this relief, it should grant the Waiver Petition as expeditiously as possible.

A. Other Major Providers of Enterprise Broadband Services are Uniformly Regulated as Nondominant with Respect to Those Services

With the exception of CenturyLink, the major national providers of enterprise broadband services are uniformly regulated as nondominant with respect to the provision of those services. Following the grant of Verizon's forbearance petition by operation of law in 2006,[9] the Commission adopted a series of orders forbearing from dominant carrier regulation and certain *Computer Inquiry* rules with respect to the enterprise broadband services provided at that time by AT&T, ACS of Anchorage, Embarq, Frontier and Qwest.[10] Through these *Enterprise Broadband Forbearance Orders*, the Commission placed these ILECs on similar regulatory

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[9] *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (Mar. 20, 2006) ("Verizon Forbearance Grant").

[10] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) ("*AT&T Forbearance Order*"), *aff'd sub nom. Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) ("*Ad Hoc Appeal*"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) ("*ACS Dominance Forbearance Order*"); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) ("*Embarq-Frontier-Citizens Forbearance Order*"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) ("*Qwest Forbearance Order*"). This petition refers to these orders collectively as the *Enterprise Broadband Forbearance Orders*.

footing with non-ILEC providers of these services, which were already regulated as nondominant. With one exception, CenturyLink is not aware of any other ILECs that provide significant enterprise broadband services under dominant carrier regulation.[11]

B. CenturyLink's Enterprise Broadband Services are Subject to Widely Varying Regulation, Which Undermines CenturyLink's Ability to Compete

Today, an enterprise broadband service provided by CenturyLink may be subject to nondominant regulation, pricing flexibility or full price cap regulation, all depending on which CenturyLink ILEC affiliate -- legacy Qwest, Embarq or CenturyTel -- provides that service. Legacy Embarq can offer customers individually-tailored commercial agreements, free from tariff and other dominant carrier regulation, with respect to some of its enterprise broadband services, but not with regard to its Ethernet Virtual Private Line ("EVPL") service, its most popular Ethernet service, or Digital Video Transmission or Wave services. That is because Embarq did not offer those services at the time the Commission granted Embarq forbearance in 2007.[12] Thus, even though legacy Qwest has great flexibility in offering Metro Ethernet (which is comparable to EVPL), and all of its other enterprise broadband services, as a practical matter, legacy Embarq typically must provide EVPL via general tariff.[13]

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[11] Windstream's acquisition of CLEC PAETEC in 2011 significantly increased its presence as a provider of enterprise broadband and other business services, *see* Craig Gailbraith, *Windstream "Transforms" With PAETEC Mega-Merger*, Billing & OSS World (Aug. 1, 2011), *available at* http://www.billingworld.com/news/2011/08/windstream-transforms-with-paetec-mega-merger.aspx, but the offerings of PAETEC and Windstream's other CLEC affiliates are not subject to dominant carrier regulation.

[12] *See Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd 19478.

[13] The only exceptions are in 14 Metropolitan Statistical Areas ("MSAs") where Embarq has pricing flexibility that enables it to negotiate contract tariffs for channel terminations. Because the limited geographic coverage of such pricing flexibility limits Embarq's ability to respond to enterprise customer needs, Embarq has entered into only two such agreements covering EVPL

At the other end of the spectrum from legacy Qwest, legacy CenturyTel is subject to price cap regulation for all services in all areas. It has no ability to diverge from the rates, terms and conditions in its generally available tariffs, except through the laborious and time-consuming process of modifying its tariff -- a process to which no other major national provider of enterprise broadband services is subject and that is not suitable for meeting the unique demands of particular customers in today's intensely competitive market for these services.[14] This disparate regulation has had a significant, negative impact on enterprise broadband customers, which are deprived of the simple, tailored arrangements they seek from CenturyLink and the full benefits of the synergies inherent in the CenturyTel-Embarq and CenturyLink-Qwest mergers.[15]

C. CenturyLink Seeks Forbearance for Enterprise Broadband Services Still Subject to Dominant Carrier Regulation and *Computer Inquiry* Tariffing

Consistent with Section 1.54(a)(3) and (4) of the Commission's rules, CenturyLink describes in Attachment 1 the specific services for which it seeks forbearance.[16] They include Ethernet-Based Services, Video Transmission Services and Optical Network Services. With the exception of three Embarq services, all of the services identified in Attachment 1 are legacy

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services. *See* CenturyLink Operating Companies Tariff F.C.C. No. 9, §§ 24.3, 24.20 (eff. Mar. 1, 2011). Legacy CenturyTel has no pricing flexibility.

[14] CenturyTel's plight resembles the situation faced by the main character in Man of the Century (Jubilee Pictures Corp. 1999), a movie about a newspaper reporter named "Johnny Twenties," who lives in a 1920's bubble -- including a 1920's-era telephone and typewriter -- surrounded by the modern world. Similarly constrained by a "bubble" of last century restrictions, CenturyTel's beleaguered marketing personnel are increasingly cut off from the current enterprise broadband marketplace because they are unable to respond to competition in an effective manner.

[15] *See, e.g., Applications filed by Qwest Communications Int'l Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4198 ¶ 6 (2011).

[16] 47 C.F.R. § 1.54(a)(3), (4).

CenturyTel services.[17] Each of these services fits within the definition of enterprise broadband services that the Commission employed in the *Enterprise Broadband Forbearance Orders*: "(1) . . . existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) . . . existing non-TDM-based optical transmission services."[18] CenturyLink seeks this relief throughout its ILEC service territories.

D. CenturyLink Seeks the Same Forbearance Granted to Petitioning ILECs in the *Enterprise Broadband Forbearance Orders*

Consistent with Sections 1.54(a)(1) and (e)(1) of the rules,[19] CenturyLink identifies the rules and requirements from which forbearance is sought. In the *Enterprise Broadband Forbearance Orders*, the Commission granted forbearance from application of the following regulatory requirements to the specified services covered by those orders:

- Dominant carrier tariff filing and price cap regulations, including the duty to file cost support;[20]
- Dominant carrier discontinuance requirements;[21]
- Dominant carrier domestic transfer of control requirements;[22] and

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[17] All of the services identified in Attachment 1 are existing CenturyLink ILEC services, though CenturyLink has not yet deployed Wave service in CenturyTel and Embarq service areas.

[18] *See, e.g., AT&T Forbearance Order*, 22 FCC Rcd at 18713 ¶ 12.

[19] 47 C.F.R. § 1.54(a)(1), (e)(1).

[20] *See* 47 U.S.C. §§ 203, 204(a)(3); 47 C.F.R. §§ 61.31-61.59. *See also AT&T Forbearance Order*, 22 FCC Rcd at 18726 ¶ 36, 18729 ¶ 42.

[21] *See* 47 C.F.R. § 63.71. *See also, AT&T Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

[22] *See* 47 C.F.R. § 63.03. *See also AT&T Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

- The *Computer Inquiry* tariffing requirement.[23]

CenturyLink, which is similarly situated to the ILECs granted forbearance in those orders with regard to its enterprise broadband services, seeks the same forbearance here for the enterprise broadband services listed in Attachment 1. Notably, none of the parties opposing the 2012 Forbearance Petition argued that CenturyLink is not similarly situated to the other ILECs granted similar forbearance relief.[24] Consistent with Section 1.54(c) of the Commission's rules,[25] Attachment 2 identifies pending proceedings in which CenturyLink has taken a position regarding relief that is identical to, or comparable to, the relief sought in this petition.[26]

E. This Petition Will Not Interfere With Any Other Pending Proceedings

A grant of forbearance would have no impact on the Commission's pending review of special access regulation in WC Docket No. 05-25.[27] The *Enterprise Broadband Forbearance*

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[23] *Amendment of Section 64.702 of the Commission's Rules and Regulations,* 77 FCC 2d 384, 474-75 ¶ 231 (1980) ("*Computer II Final Decision*"), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also AT&T Forbearance Order*, 22 FCC Rcd at 18735-36 ¶¶ 59-62; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19505-06 ¶¶ 50-55. In the AT&T and Qwest orders, the Commission also granted forbearance from application of any Bell Operating Company ("BOC")-specific *Computer Inquiry* requirements to those enterprise broadband services, except to the extent they imposed the same transmission access or nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services. *See AT&T Forbearance Order*, 22 FCC Rcd at 18733-35 ¶¶ 53-58; *Qwest Forbearance Order*, 23 FCC Rcd at 12288-90 ¶¶ 54-60. Since this petition requests forbearance only for CenturyLink's Embarq and CenturyTel affiliates, those BOC-specific requirements are not relevant here.

[24] *See, e.g.,* Opposition of Sprint Nextel Corp. at 3 & n.8, WC Docket No. 12-60 (Apr. 20, 2012) (acknowledging CenturyLink request for "similar relief" granted to other ILECs).

[25] 47 C.F.R. § 1.54(c).

[26] The 2012 Forbearance Petition is no longer pending.

[27] *See Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) ("*Special Access Data Collection Order*") (subsequent history omitted). *See also Special Access Rates for Price Cap Local*

Orders expressly excluded "TDM-based . . . special access services" from the scope of the forbearance relief granted in those orders and noted that "concerns" regarding "the existing regulation of special access services other than those for which we grant relief, as in prior proceedings," "are more appropriately addressed on an industry-wide basis in pending rulemaking proceedings."[28] The special access rulemaking proceeding thus is limited to special access services not addressed in the *Enterprise Broadband Forbearance Orders*. As a result of those orders, "the scope of services affected by the *Special Access NPRM* narrowed considerably."[29] This petition seeks relief only for the same categories of services covered by the other *Enterprise Broadband Forbearance Orders*. Other than similarly removing CenturyLink's enterprise broadband services from the scope of the special access rulemaking, this petition thus will have no impact on that proceeding.

If the Commission were to reexamine its treatment of enterprise broadband services on an industry-wide basis sometime in the future, a grant of this petition would merely place CenturyLink temporarily on equal footing with its competitors and other incumbents pending completion of such a proceeding. CenturyLink hereby stipulates that any grant of this petition would be superseded by the outcome of any such industry-wide proceeding.

Exchange Carriers, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access NPRM*").

[28] *AT&T Forbearance Order*, 22 FCC Rcd at 18717 ¶ 20, 18722 ¶ 27; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489 ¶ 19, 19495 ¶ 26.

[29] *Special Access Data Collection Order*, 27 FCC Rcd at 16323 ¶ 9.

II. THE PRINCIPLE OF REGULATORY PARITY AND THE ADMINISTRATIVE PROCEDURE ACT COMPEL A GRANT OF FORBEARANCE

Under the standard of judicial review of agency action required under the "arbitrary and capricious" rubric of the Administrative Procedure Act ("APA"),[30] an agency has to "apply the same criteria to all [parties] petitioning for exemptions."[31] In *Airmark*, a case involving denials of petitions for exemption from Federal Aviation Administration ("FAA") noise regulations, the D.C. Circuit held that "[d]eference to agency authority or expertise . . . 'is not a license to . . . treat like cases differently.'"[32] The court found that, although the FAA "retains broad discretion to determine whether the public interest will be best served by granting or denying" exemptions, the FAA "utterly failed to provide a consistent approach" in ruling on the petitions at issue.[33] The court explained that "the FAA has arbitrarily applied different decisional criteria to similarly situated carriers."[34] For example, in granting an exemption to another carrier, "the FAA took an opposite view of the very considerations that had been fatal to" one of the petitions at issue.[35]

Similarly, in *Marco Sales*, the Second Circuit reversed a Federal Trade Commission cease and desist order against a sales practice similar to practices previously permitted, holding that an agency is not permitted to "'grant to one person the right to do that which it denies to

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[30] 5 U.S.C. § 706(2)(A).

[31] *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985).

[32] *Id.* at 691 (quoting *United States* v. *Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984) (affirming lower court order allowing medical device to be marketed without FDA approval in light of its similarity, in all relevant respects, to a device previously approved by FDA)).

[33] *Id.* at 695.

[34] *Id.* at 692.

[35] *Id.* at 694.

another similarly situated. There may not be a rule for Monday, another for Tuesday . . . .'"[36] In *Local 777*, the D.C. Circuit held that no deference was owed to a National Labor Relations Board ("NLRB") decision because "the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually [identical] situations," noting that an agency "cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly"[37] Applying these principles to this Commission's denial of forbearance relief, the D.C. Circuit held that it is arbitrary and capricious to deny forbearance under a standard that "yielded opposite results" in prior forbearance proceedings without an adequate explanation for the change.[38]

The APA's requirement that an agency apply the same "decisional criteria to similarly situated carriers"[39] echoes and reinforces the Commission's well-established forbearance policy of "regulatory parity" -- specifically, the "need to ensure regulatory parity" with other ILECs granted similar forbearance relief.[40] In granting forbearance relief in the *AT&T Forbearance Order*, the Commission stated that:

> We agree with AT&T regarding the need to ensure regulatory parity between Verizon on the one hand, and AT&T on the other. . . . We seek to avoid persistent regulatory disparities between

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[36] *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev'd on other grounds*, 382 U.S. 46 (1965)).

[37] *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978) ("*Local 777*"). *See also id.* at 870 n.22 (NLRB reached "essentially a different decision on essentially the same facts").

[38] *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 303 (D.C. Cir. 2009).

[39] *Airmark*, 758 F.2d at 692.

[40] *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 50.

> similarly-situated competitors, and seek *to minimize the time in which they are treated differently.*[41]

The other *Enterprise Broadband Forbearance Orders* also granted relief partly on this basis.[42] The Commission's concern for regulatory parity in applying Section 10 recognizes that it cannot serve consumers or the public interest for one provider to be arbitrarily selected for continued regulatory burdens lifted from others similarly situated. Similarly, earlier this year, the *USTelecom Forbearance Order* granted forbearance from the equal access scripting rules to "all ILECs . . . not previously . . . granted forbearance"[43] and forbearance to all other ILECs from various accounting rules previously lifted from the Bell Operating Companies,[44] "[f]or the same reasons that we granted forbearance to AT&T, Verizon, and Qwest"[45] -- *i.e.*, regulatory parity.

The *AT&T Forbearance Order* is an especially powerful precedent on this issue because the Commission's concern for regulatory parity with another similarly situated ILEC was expressed at a time when only one ILEC -- Verizon -- had been granted nondominant status with regard to its enterprise broadband services.[46] Most of the ILEC enterprise broadband sector was still subject to dominant carrier regulation. Nevertheless, the Commission viewed regulatory parity as a compelling basis to align AT&T with forborne Verizon, rather than with the majority

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[41] *Id.* (emphasis added).

[42] *See, e.g., Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19503 ¶ 45 n.167.

[43] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7637-38 ¶ 17 (2013) ("*USTelecom Forbearance Order*").

[44] *Id.* at 7650-51 ¶ 41, 7675-76 ¶ 107.

[45] *Id.* at 7675-76 ¶ 107. "Imposing these costs on some competitors but not others may undermine competition." *Id.*

[46] *See* Verizon Forbearance Grant.

of ILECs. Today, when virtually all other ILECs are forborne in their offerings of nationwide enterprise broadband services, and all of the ILECs seeking such forbearance have won it, "the need to ensure regulatory parity" with those ILECs is an even more compelling rationale for forbearance than it was in the *AT&T Forbearance Order*. The Commission should follow through on its stated intention in that order to address "other BOC forbearance petitions seeking comparable relief, on grounds comparable to those set forth in this order."[47]

As with the application of the Section 10 principle of regulatory parity, the APA's equal treatment requirements also gather additional force where similar forbearance relief has already been granted to much larger ILECs and the last significant national ILEC provider of enterprise broadband services still under dominant carrier regulation seeks similar treatment. Because of the price reductions and other benefits flowing from the relief granted in the *Enterprise Broadband Forbearance Orders* and the absence of any harm since then, the case for relief is even clearer for CenturyLink than it was in those orders.[48] Failure to recognize the "need to

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[47] *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 50. In *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8642 ¶ 37, 8644 ¶ 39 (2010) ("*Phoenix Forbearance Order*"), *aff'd sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012), the Commission changed its approach to the competitive analysis of non-broadband TDM legacy services. There, however, the Commission essentially subjected Qwest to a more stringent standard in one location than the one it had applied in granting Qwest's previous similar forbearance requests in other locations. *See id.* at 8630-31 ¶¶ 16-17 & n.56 (after granting similar forbearance relief to Qwest for its TDM legacy services in the Omaha, Nebraska area, it granted similar relief to Qwest in another geographic area and to ACS of Anchorage, Inc., which the Commission characterized as presenting "'unique circumstances'") (citation omitted)). In the case of enterprise broadband services, however, virtually the entire industry, including market leaders Verizon and AT&T, has been relieved of dominant carrier regulation, and CenturyLink is requesting to be treated like all of those other carriers.

[48] *See infra*, Part III.

ensure regulatory parity"[49] in CenturyLink's circumstances -- the strongest case yet presented for regulatory parity in the enterprise broadband context -- would unfairly "arbitrarily treat similar situations dissimilarly" to an extreme degree, in violation of the APA.[50]

III. THE REQUESTED FORBEARANCE FROM DOMINANT CARRIER REGULATION EASILY SATISFIES EVERY REQUIREMENT OF SECTION 10

Under Section 10, the Commission "shall forbear from" applying a statutory or regulatory provision if it determines that the criteria set forth in Section 10(a) are met with regard to such rule. CenturyLink's requested forbearance from dominant carrier regulation of its enterprise broadband services easily satisfies each of the three requirements in Section 10(a):

- The applicable regulations are not necessary to ensure that the enterprise broadband services in question are provided on a just and reasonable and not unjustly or unreasonably discriminatory basis;
- Those regulations are not necessary to protect customers; and
- The requested forbearance is in the public interest.

In making the public interest determination, the Commission must consider, pursuant to Section 10(b), "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[51]

These criteria are fully met by the enterprise broadband customer benefits resulting from the *Enterprise Broadband Forbearance Orders* over the past several years and the absence of any reported harm to customers resulting from those orders. Those benefits and the absence of

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[49] *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 50.

[50] *Local 777*, 603 F.2d at 872. *See also Airmark*, 758 F.2d at 691 (arbitrary and capricious standard requires an agency to "apply the same criteria to all [parties] petitioning for exemptions").

[51] 47 U.S.C. § 160(b).

harm provide more than adequate evidence of the overwhelmingly positive impacts of lifting dominant carrier regulation from virtually the entire enterprise broadband industry, including market leaders Verizon and AT&T. Since those orders were issued, enterprise broadband prices have dropped, demand has increased and CLECs have successfully expanded their operations.

For example, CenturyLink has used its partial forbearance to negotiate more than 300 customized agreements with wholesale and retail enterprise broadband customers, generally at rates significantly lower than its previously tariffed rates. Greater competition is continuing to cause downward pricing pressure for all enterprise broadband providers.[52] CLECs continue to use multiple alternatives to ILEC broadband services to provide their own competing enterprise broadband services. They can deploy their own facilities, use a cable provider's or other third party's wholesale services,[53] use TDM-based DS1 and DS3 services or use copper loops purchased at TELRIC rates, as many CLECs have successfully done.[54] For example, Level 3

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[52] *See* TeleGeography, *Global Enterprise Networks: Enterprise Service Pricing*, at 16 (Jan. 2013) ("Median Ethernet market prices remain volatile, fluctuating considerably year to year. . . . With this said however, the long-term price trend is clearly down."); *id.* at 20 ("As a growing number of carriers offer the service, [Virtual Private LAN Service] prices continue to decline."), appended as Attachment 3; Insight Research Corp., *US Carriers and Ethernet Services: 2013-2018*, at 5 (Aug. 2013) ("Over the past decade price declines of 10 percent or more per year have been common . . . .") ("*Insight Ethernet Report*"), appended as Attachment 4.

[53] *See* Sean Buckley, *Cox Names Jeremy Bye as VP of Its Growing Wholesale Group*, Fierce Telecom (Aug. 23, 2011), *available at* http://www.fiercetelecom.com/story/cox-names-jeremy-bye-vp-its-growing-wholesale-group/2011-08-23; Press Release, Cbeyond, *Cbeyond Announces Partnership with FiberLight* (May 2, 2012), *available at* http://files.shareholder.com/downloads/CBEY/2714794185x0x565639/a1d9ab20-d806-4974-8024-53255b1c0065/CBEY_News_2012_5_2_General.pdf ("Cbeyond FiberLight Press Release"); Frost & Sullivan, *Analysis of the Wholesale Carrier Ethernet Services Market, 2012: Mobile Backhaul and Retail Market Trends Fuel Revenue Growth*, at 33 (Dec. 2012) (finding that there are "over 25" providers of wholesale carrier Ethernet services) ("*Frost Wholesale Carrier Ethernet Analysis*"), appended as Attachment 5.

[54] *See infra*, Part III. B.1.a.

told investors earlier this year that it enjoys margins of 50 percent on "off-net" traffic and 100 percent for "on-net" traffic.[55]

These consumer benefits are the hallmarks of the "competitive market conditions" that are key to Section 10's public interest requirement.[56] CenturyLink still accounts for less than ten percent of the enterprise broadband services market.[57] Because these consumer and public interest benefits can only increase with similar relief for an enterprise broadband service provider of the modest scale of CenturyLink, no additional analysis should be necessary. A detailed competitive analysis is not a statutory prerequisite to Section 10 relief.[58] In an abundance of caution, however, CenturyLink provides market data and analysis below that should be more than sufficient to satisfy the applicable standard for forbearance relief.

A. The *Enterprise Broadband Forbearance Orders* Provide the Appropriate Competitive Standard

To the extent that any competitive analysis is necessary to secure forbearance relief from dominant carrier regulation for CenturyLink's enterprise broadband services, the appropriate standard was established in the *Enterprise Broadband Forbearance Orders*. In those orders, the Commission recognized that the dynamic, rapidly evolving nature of enterprise broadband services and the sophistication and size of the customers buying these services required a

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[55] Transcript of Level 3 Communications, Inc. Presentation, Morgan Stanley Technology, Media & Telecom Conference, at 1-3 (Feb. 26, 2013), appended as Attachment 6.

[56] 47 U.S.C. § 160(b).

[57] *See infra*, Part III.B.1.b.

[58] *See Phoenix Forbearance Order*, 25 FCC Rcd at 8643 ¶ 37 n.120 ("Carriers are . . . free to seek forbearance based on factors other than, or in addition to, claimed competition, so long as the section 10 criteria are satisfied," citing previous order "granting conditional forbearance from the 'current partial and uneven' collection of certain service quality and infrastructure data") (citation omitted).